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No. 73-750

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

JOAQUIN G. BLAZ, DIRECTOR OF REVENUE AND TAXATION, GOVERNMENT OF GUAM, *Petitioner*

v.

JOHN L. MANNING AND CARLYN T. MANNING, HUSBAND AND WIFE, AND GENERAL INSURERS, INC., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

JOHN L. MANNING AND CARLYN T. MANNING, HUSBAND AND WIFE, AND GENERAL INSURERS, INC., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Joaquin G. Blaz, Director of Revenue and Taxation, Government of Guam (the "Director"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these consolidated cases.

OPINIONS BELOW

The summary judgments of the district court (Appendix A, *infra*, pp. 1a, 2a.) are not officially (or unofficially) reported. The opinion of the court of appeals (Appendix A, *infra*, pp. 3a-5a.) is reported at 479 F.2d 333.

JURISDICTION

The judgments of the court of appeals were entered on April 5, 1973. (Appendix A, *infra*, pp. 5a, 6a.) The court of appeals granted the Director's motion to extend the time to file a petition for rehearing en banc to and including May 9, 1973. A timely petition for rehearing en banc was mailed to the court of appeals on May 5, 1973. The court of appeals rejected the petition for rehearing en banc on July 5, 1973. On September 22, 1973, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including November 9, 1973. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The question presented is whether United States citizens not residing in Guam are entitled to derive those benefits in reducing their income tax liability to Guam which are accorded to Guam citizens and residents. The impact of the erroneous decision of the court below is to treat all non-Guamanian United States citizens not residing in Guam the same as Guamanians, rather than as nonresident aliens, for all purposes of the Guam territorial income tax. If the decision below is left to stand intact, it necessarily follows that *all United States citizens, whether or not they have Guam-based income, would be fully taxable for years prior to 1973 in both the United States and Guam on their entire worldwide income.* Section 1 of the Internal Revenue Code of 1954 (the "Code"); *Sayre & Co.* v. *Riddell*, 395 F.2d 407, 412 (9th Cir. 1968).

STATUTES INVOLVED

The pertinent provisions of the Organic Act of Guam and the Internal Revenue Code of 1954 are printed in Appendix B, *infra*, pp. 6a-15a.

STATEMENT

These consolidated cases involve the Guam territorial income tax law prior to its amendment in 1972, effective only for taxable years beginning after December 31, 1972. See Section 935 of the Code (Appendix B, *infra*, pp. 12a-14a.), Act of October 31, 1972, P.L. 92-606, 86 Stat. 1494. The *Manning* case involves the calendar years 1966, 1967 and 1968, with a total net deficiency of $815.70. The *General Insurers* case involves fiscal years ending September 30, 1966, 1967 and 1968, with a total deficiency of $63,328.73.

The Mannings are United States citizens, residing in the Philippine Islands, who reported and returned Guam-source income in the years in issue. The Mannings did not receive their United States citizenship under the Organic Act of Guam (c. 512, 64 Stat. 384, Section 4(a) (48 U.S.C. 1421 l)).

General Insurers, Inc. (the "corporation") is a Guam corporation that filed a timely election under Section 1372 of the Code to be treated as an electing small business corporation under Subchapter S (Sections 1371-1379 of the Code) as made applicable to Guam by Section 31, Organic Act of Guam (c. 512, 64 Stat. 384 (48 U.S.C. 1421 i)). (Appendix B, *infra*, pp. 6a-8a.) If the election to be treated as a small business corporation were valid, the corporation would not be subject to taxes imposed by Chapter 1 of the Code, except for certain taxes not at issue in this case.

Three of the corporation's shareholders, of whom one was John L. Manning, are United States citizens who are not residents of Guam and who did not receive their citizenship under the Organic Act of Guam.

The Director (sometimes referred to in the decisions below as the Commissioner of Revenue and Taxation) treated the Mannings as nonresident aliens for Guam income tax purposes, subject to the provisions of Section 871 of the Code. Thus, the Mannings were not permitted to take the standard deduction or to file a joint return for Guam income tax purposes because these benefits are expressly denied to nonresident aliens under Sections 142(b)(1), 873(c)(1) and 6013 (a)(1) of the Code. (Appendix B, *infra,* pp. 9a, 11a, 14a.) Moreover, consistent with this classification, the Director required the Mannings to report and return to Guam only that portion of their total gross income connected with Guam sources. Sections 871 and 872 of the Code.

The Director denied the corporation's election to be treated as a small business corporation under Subchapter S as made applicable to Guam by the Organic Act of Guam. The basis for this denial was the Director's classification of the three non-Guamanian United States citizen shareholders of the corporation who do not reside in Guam as nonresident aliens of Guam within the meaning of Section 1371(a)(3) of the Code. Section 1371(a)(3) of the Code provides that the term "small business corporation" cannot include a corporation having a nonresident alien as a shareholder.

Upon cross-motions for summary judgment, the district court (which obtained jurisdiction on the basis of 48 U.S.C. 1421 i(h)(2)) granted the respondents'

motions and concluded that a non-Guamanian United States citizen, who did not reside in Guam, was not to be treated as a nonresident alien for Guam income tax purposes. (Appendix A, *infra,* pp. 1a, 2a.) The court of appeals affirmed, holding that the ability of the Government of Guam to classify non-Guamanian United States citizens who are not residents of Guam as nonresident aliens for Guam income tax purposes depended upon the availability of Section 932 of the Code to Guam prior to its amendment in 1972. (Appendix A, *infra,* p. 4a.) The court of appeals then concluded that its decision in *Flores* v. *Government of Guam,* 444 F.2d 284 (9th Cir. 1971), which held that Section 932 of the Code (Appendix B, *infra,* p. 12a.) was inapplicable to Guam, controlled its decision in these consolidated cases, so that the Government of Guam could not treat individuals such as the Mannings as nonresident aliens for Guam income tax purposes. (Appendix A, *infra,* pp. 4a, 5a.) Compare, *Sayre & Co.* v. *Riddell,* 395 F.2d 407 (9th Cir. 1968) (en banc).

REASONS FOR GRANTING THE WRIT

The court of appeals erroneously held that non-Guamanian United States citizens, who are not residents of Guam, are not nonresident aliens for Guam income tax purposes. This decision is of critical importance to the administration of the Guam territorial income tax for the years 1970, 1971 and 1972, which are still open for the filing of claims for refund.

The Deputy Commissioner of Revenue and Taxation of Guam has reviewed the returns filed in Guam in 1970, 1971 and 1972 by resident and nonresident aliens. This review has indicated that there is a total of at

least 4,536 returns affected by the decision below that could be made the subject of claims for refund. If the Guam authorities were to make all the refunds under the potential claims, the total revenue loss to Guam would amount to at least $1,961,723, plus statutory interest. This represents 5 percent of the entire income tax assessment by Guam for 1972. By way of comparison, a case of equivalent importance to the United States—that is, a potential revenue loss of 5 percent of tax assessments—would amount to over $9 billion in revenue losses.

Guam has a "mirror" income tax; that is, those income tax laws which are in effect from year to year in the United States are likewise in effect to the exact same extent in Guam. Organic Act of Guam, § 31(a), as amended in 1958. (Appendix B, *infra,* p. 6a.) The income tax liabilities which arise under the Organic Act of Guam are payable to the Government of Guam. Organic Act of Guam, § 31(b). (Appendix B, *infra,* p. 6a.) The incorporation of the Internal Revenue Code of 1954 as the governing tax statute of Guam is accomplished by the Organic Act, which provides (under Section 31(e) of the Organic Act) as follows:

> In applying as the Guam Territorial income tax the income-tax laws in force in Guam pursuant to subsection (a) of this section, except where it is manifestly otherwise required, the applicable provisions of the Internal Revenue Codes of 1954 and 1939, shall be read so as to substitute "Guam" for "United States", * * * and with other changes in nomenclature and other language, including the omission of inapplicable language, where necessary to effect the intent of this section.

Under the Internal Revenue Code of 1954 there are only three categories of individuals for income tax purposes: citizens of the United States, resident aliens and nonresident aliens. Citizens of the United States and resident aliens are subject to a graduated income tax on their worldwide net income. Section 1 of the Code. However, a nonresident alien is subject to a more limited income tax based upon his gross income only from sources within the United States. Sections 871 and 872 of the Code.

Inasmuch as the Guam income tax laws mirror the United States income tax laws, there can be only three categories of individuals for Guam income tax purposes: citizens of Guam, resident aliens and nonresident aliens. An examination and analysis of the substitutions and changes in the applicable income tax regulations promulgated under Sections 1 and 871 of the Code, which is necessary under the mirror theory to convert those provisions of United States income tax law into the Guam income tax law, will readily demonstrate that non-Guamanian United States citizens, who are not residing in Guam, must be treated as nonresident aliens for Guam income tax purposes.

Section 1.1-1(c) of the Treasury Regulations on Income Tax (1954 Code) provides that "[e]very person born or naturalized in the United States and subject to its jurisdiction is a citizen." Under the Director's application of the mirror system, this provision would read that "[e]very person born or naturalized in Guam and subject to its jurisdiction is a citizen." Thus, since neither the Mannings nor the other non-Guamanian United States citizen shareholders of the corporation were born or naturalized in Guam, they are clearly, and may only be classified as, aliens of

Guam. They cannot be considered citizens of Guam for purposes of the Guam income tax.

The first sentence of § 1.871-2(a) of the Treasury Regulations on Income Tax (1954 Code) provides that "[t]he term 'nonresident alien individual' means an individual whose residence is not within the United States, and who is not a citizen of the United States." Under the Director's application of the mirror system, this provision would read that "[t]he term 'nonresident alien individual' means an individual whose residence is not within Guam, and who is not a citizen of Guam." Thus, since neither the Mannings nor the other non-Guamanian United States citizen shareholders of the corporation are citizens of Guam or reside in Guam, it is manifest that they must be treated as nonresident aliens of Guam for Guam income tax purposes.[1]

This conclusion follows logically from the operation of the Internal Revenue Code. Under the general structure of the Code, where an individual is either a citizen or a resident alien, the tax under Section 1 of the Code is based upon jurisdiction over the person. Where the individual is a nonresident alien, however, the tax under Section 871 of the Code is based upon the connection of the income with the jurisdiction imposing the tax. See *Sayre & Co.* v. *Riddell, supra,* 411. When applying the general structure of the Code to

[1] The substitution of "Guam" for the "United States" is clearly required under Section 31(e) of the Organic Act. Furthermore, such substitutions are nonsubstantive changes in nomenclature which are necessary to avoid confusion as to the taxing jurisdiction involved for purposes of Sections 1 and 871 of the Code and are necessary to effect the clear intent of these Sections. See *Wilson* v. *Kennedy,* 123 F. Supp. 156 (D. Guam 1954), aff'd, 232 F. 2d 153 (9th Cir. 1956).

individuals who are taxed in both the United States and Guam,[2] it is clear that where the United States exercises personal jurisdiction over an individual as a citizen or resident alien, then such individual, unless he is a citizen of Guam, must be a nonresident alien for Guam income tax purposes. This categorization is consistent with the fact that Guam is not exercising personal jurisdiction over non-Guamanian United States citizens who are not residents of Guam. Any other conclusion leads to the patently absurd result of authorizing (indeed, perhaps, of directing) Guam to impose a graduated tax on an individual's worldwide income under Section 1 of the Code even though Guam does not have personal jurisdiction over such individual.

Moreover, classifying a non-Guamanian United States citizen who is not residing in Guam as a nonresident alien for Guam income tax purposes is consistent with the operation of Section 871 of the Code. Under Section 871 of the Code, the Government of Guam may only impose a tax on such an individual because of the connection of that individual's income with Guam, not by reason of any personal jurisdiction over such individual. A prerequsite to imposing a

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[2] For the years in dispute the Mannings and the other non-Guamanian United States citizen shareholders of the corporation, none of whom is a resident of Guam, were required to file two returns. Their United States returns reported their worldwide income, and their Guam returns reported their Guam-source income. Double taxation was prevented through an allowance by the United States of a foreign tax credit for income derived from sources within Guam. Section 901(b) of the Code. Thus, the Code itself recognizes that the United States and Guam treat each other as foreign countries for purposes of their internal revenue laws.

tax on an individual under Section 871 of the Code is the finding that the individual is a nonresident alien. This is the position of the Director in this case; however, this position was erroneously not accorded viability by the court of appeals.

The classification of individuals such as the Mannings as nonresident aliens for Guam income tax purposes mirrors and is consistent with the manner in which the United States treated citizens of Guam for United States income tax purposes during the taxable years involved in this case. See Section 932 of the Code, prior to its amendment in 1972, effective for taxable years beginning after December 31, 1972 (Appendix B, *infra*, p. 12a.), which provides that citizens of possessions of the United States, who are only citizens of the United States by reason of their citizenship in a possession, and are not residents of the United States, are classified as nonresident aliens for United States income tax purposes. This provision was clearly applicable prior to 1973 in classifying Guamanians as nonresident aliens for purposes of the United States income tax provisions. See also Rev. Rul. 56, 1953-1 Cum. Bull. 303; and Rev. Rul. 70-230, 1970-1 Cum. Bull. 166. Thus, the very benefits sought by the taxpayers in this case, and permitted by the court of appeals, were denied to Guamanians for United States income tax purposes.[3]

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[3] It is clear that, under the mirror theory, Guam "should apply the Internal Revenue Code * * * to persons and income within its territory just as the United States applies the Code to persons and income within its territory." *Sayre & Co.* v. *Riddell, supra*, 412. An example of the anomaly of the court of appeals decision is that while non-Guamanian United States citizens who are not residents of Guam are allowed to be shareholders in domestic Guam corporations that desire to be treated as small business cor-

The decision below ignores the fundamental and essential premise of the mirror system that treats Guam and the United States as separate and distinct taxing jurisdictions.[4] Organic Act of Guam, § 31(b) (Appendix B, *infra*, p. 6a.) See *Laguana* v. *Ansell*,

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porations under Subchapter S, Guamanians who are not residents of the United States clearly may not be shareholders in domestic United States corporations that desire to be treated as small business corporations under Subchapter S. This result would ignore the "mirror" image concept (and its dual filing requirement) of the Guam income tax statute. Moreover, the disparity of this result is directly contrary to what Congress understood the law to be prior to the enactment of Section 935. See H. Rep. No. 92-1479, *infra*, 9.

[4] The Virgin Islands, like Guam, has a mirror income tax essentially identical to the United States Internal Revenue Code. Naval Service Appropriation Act of 1922 (c. 44, 42 Stat. 123, § 1 (48 U.S.C. 1397)). Unlike the Guam mirror system, however, the Virgin Islands mirror system was not adopted through specific legislation, but rather through an administrative ruling some forty years ago, which was cited with approval by Congress in adopting the Guam mirror system. See S. Rep. No. 2176, 85th Cong. 2d Sess., 5, 6 (2 U.S.C. Cong. & Adm. News (1958) 3651-3653), citing I. T. 2946, XIV-2 Cum. Bull. 109 (1935), declared obsolete in Rev. Rul. 69-45, 1969-1 Cum. Bull. 313, obsolescence withdrawn in Rev. Rul. 73-315, 1973-31 I.R.B. 5, which updated and restated I.T. 2946. Both I.T. 2946 and Rev. Rul. 73-315 provide that for Virgin Islands income tax purposes citizens of the United States residing in the Virgin Islands must be considered as resident aliens, and citizens of the United States not residing in the Virgin Islands must be treated as nonresident aliens. This rule was, and is still, fundamental to the dual filing requirement of the mirror system. However, notwithstanding this almost forty-year history of the mirror system in I. T. 2946, a recent unreported district court decision in *Great Cruz Bay, Inc.* v. *Wheatley*, — F. Supp. — (D.V.I. 1973), has chosen not to follow I. T. 2946 and has incorrectly held that United States citizens not residing in the Virgin Islands are not nonresident aliens for Virgin Islands income tax purposes. An appeal in this case is now pending in the Third Circuit.

102 F.Supp. 919 (D. Guam 1952), aff'd *per curiam,* 212 F.2d 207 (9th Cir. 1954), cert. denied, 348 U.S. 830 (1954); *Jennings* v. *United States,* 168 F.Supp. 781 (Ct. Cl. 1958), vacating opinion, 155 F.Supp. 571 (Ct. Cl. 1957); I.T. 4046, 1951-1 Cum. Bull. 57. The basic premise of the mirror system, upon which is founded the requirement of having to file two returns, is that citizens of Guam who do not reside in the United States are "nonresident aliens" for purposes of the United States income tax (Section 932 of the Code; Rev. Rul. 56, *supra*), and non-Guamanian citizens of the United States who do not reside in Guam are "nonresident aliens" for purposes of the Guam income tax (Rev. Rul. 8, 1953-1 Cum. Bull. 300, 301).[5]

Under the mirror system of taxation of Guam, prior to the Act of October 31, 1972, P.L. 92-606, 86 Stat. 1494, effective only for taxable years beginning after December 31, 1972, Guam and the United States were as much foreign countries to each other as, for example, would be France and the United States. The Senate Report to the 1958 amendments to the Organic Act (S. Rep. No. 2176, 85th Cong., 2d Sess., 1-7 (2 U.S.C. Cong. & Adm. News (1958) 3647-3653)) clearly recognized this fact through its explicit incorporation by reference of the Executive Communication from the Department of Interior which explained the provisions of the proposed bill. In explaining sub-

[5] For taxable years beginning after December 31, 1972, the requirement of the filing of two returns has been changed and now only one return is filed. Section 935(c) of the Code. (Appendix B, *infra,* pp. 13a, 14a.) That one return includes the taxpayer's worldwide income and the jurisdiction that does not have a return filed with it is, in effect, subsidizing the other jurisdiction by having the tax obligation owed to it satisfied by payment to the other jurisdiction.

section (b) of Section 31 of the Organic Act (Appendix B, *infra,* p. 6a.), the Department stated as follows:

> Subsection (b) sets forth the basic interpretation of the present section 31 as presently enforced and as set forth in Laguana v. Ansell which in turn followed I.T. 4046 and I.T. 2946, the latter being with reference to the Virgin Islands tax.

See 2 U.S.C. Cong. & Adm. News (1958) 3651.

In I. T. 4046, *supra,* 58, 59, the Bureau of Internal Revenue stated as follows:

> I.T. 2946 (C.B. XIV-2, 109 (1935)) holds in part that the United States and the Virgin Islands are separate and distinct taxing jurisdictions although their income tax laws arise from an identical statute applicable to each. It is stated in that ruling that it will be necessary, in some sections of the law (Revenue Act of 1934), to substitute the words "Virgin Islands" for the words "United States" in order to give the law proper effect in those islands. It is believed that the same principles are applicable to Guam in view of the above-mentioned provisions of the Organic Act of Guam.

In I.T. 2946, *supra,* 110, the Bureau of Internal Revenue stated as follows:

> In construing the Revenue Act of 1934, as in effect in the Virgin Islands, it will, of course, be necessary in some sections of the law to substitute the words "Virgin Islands" for the words "United States", in order to give the law proper effect in those islands. From the viewpoint of the Virgin Islands, citizens of the United States residing in the islands must be considered as resident aliens, and *citizens of the United States not residing in*

> *the Virgin Islands must be treated as nonresident aliens.* [Emphasis supplied.]

The emphasized language[6] was clearly provided by the Bureau, and has ever since that time always been understood to be the very basis of the mirror system, so as to avoid the absurd result of having both the United States and a possession impose a tax on an individual's worldwide income. See *Sayre & Co.* v. *Riddell, supra,* 412.

Under the decision below, this absurd result may be avoided only through a definition of a nonresident alien for Guam income tax purposes that varies from provision to provision throughout the Internal Revenue Code. The court of appeals has held that individuals such as the Mannings are not nonresident aliens for purposes of the standard deduction, filing a joint return and becoming shareholders in Subchapter S corporations. The court of appeals decision is silent, however, as to whether such individuals are not nonresident aliens for purposes of returning only to Guam income connected with Guam under Sections 871 and 872 of the Code. The definition of the term "nonresident alien" must be the same throughout the Code.[7]

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[6] This principle of the mirror system was expressly provided by Section 261 of the Revenue Act of 1918 (c. 18, 40 Stat. 1057), which made the provisions of the Revenue Act of 1916 applicable to Puerto Rico and the Philippine Islands. Section 261 provided that an "individual who is neither a citizen nor a resident of Puerto Rico or the Philippine Islands but derives income from sources therein, shall be taxed in Puerto Rico or the Philippine Islands as a nonresident alien individual * * *."

[7] For example, it is clear that the prohibition against a Subchapter S election by corporations with nonresident alien shareholders reflects the fact that nonresident aliens are usually not subject to the graduated individual income tax rates under Section 1 of the Code. Rather, they are taxed under Section 871

The Internal Revenue Code itself recognizes that this is the case by providing a cross reference in Section 873(c)(1) (Subchapter N, Part II, Subpart A (which includes Section 871)) to Section 142(b)(1) and the disallowance of the standard deduction. Thus, the term nonresident alien must have the same meaning in Sections 871 and 873 and Section 142(b)(1) of the Code.

If, consistent with the court of appeals' decision, the Mannings are not nonresident aliens of Guam for purposes of Section 871 of the Code, then the Director is justified in imposing a tax on the Mannings on their worldwide income under Section 1 of the Code. This position has not been asserted up to this time by the Director. Yet, in order to recoup the materially adverse revenue loss occasioned by the decision below, the Director is prepared to take such position if the decision below is allowed to stand. See *Sayre & Co.* v. *Riddell, supra,* 412.

The tax officials of Guam believe that the decision below, and its failure to provide guidelines for a proper administration of the Guam territorial income tax, is certain to lead to a prolific amount of litigation. These problems can be avoided merely through the recognition of the long-established principle of the mirror theory, and its dual filing requirement, classify-

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(and in this case at the flat rate of 30 per cent because the income is not effectively connected with a Guam trade or business within the meaning of Section 871(b) of the Code). See Bittker & Eustice, *Federal Income Taxation of Corporations and Shareholders,* § 6.02, 6-9 (3d ed. 1971). Thus, the term nonresident alien must have the same meaning in Sections 871 and 1371(a)(3) of the Code because the prohibition in Section 1371(a)(3) is based upon the method of taxing nonresident aliens under Section 871 of the Code.

ing stateside United States citizens as nonresident aliens for territorial income tax purposes. See I.T. 2946, *supra*; Rev. Rul. 8, *supra*; and Rev. Rul. 73-315, *supra*.

The question presented is so fundamental to the mirror system and a proper administration of the Guam tax laws, and the court of appeals' decision has so deviated from what the United States and Guam taxing officials and Congress[8] have always understood the law to be, that the Court should review the opinion below. See Rev. Rul. 8, *supra*, 301. See also H. Rep. No. 92-1479, 92nd Cong., 2d Sess., 9 (1972) (3 U.S.C. Cong. & Adm. News (1972) 5408), wherein the House Ways and Means Committee, in explaining the change wrought by Section 935 of the Code for taxable years after December 31, 1972, stated as follows:

> * * * [A]ny U.S. citizen or resident may be a shareholder in a so-called subchapter S corporation which is created or organized under the law of Guam (under present law *U.S. Stateside citizens may not be such shareholders since they previously have been classified as nonresident aliens under Guamanian tax law)*. [Emphasis supplied.]

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[8] Simultaneously with the adoption of Section 935 of the Code, which eliminated the dual filing requirement of the mirror system as to Guam, Section 932 of the Code was amended specifically to exclude Guamanians from being classified as nonresident aliens for purposes of United States income taxes. The reason for this was to treat Guamanians and all other United States citizens in the same manner because their worldwide income will be subject to taxation either in Guam or the United States, depending solely on the residency of the taxpayer at the end of his taxable year. Congress understood that it was accomplishing the same result for Guam income tax purposes as to non-Guamanian United States citizens who do not reside in Guam through this legislation. H. Rep. No. 92-1479, *infra*, 9.

Since appellate review of the decisions of the taxing authorities of Guam is limited to the United States Court of Appeals for the Ninth Circuit, there is no possibility of a conflict of decisions developing between the circuits. Nonetheless, in view of the obvious error of the court of appeals, review by this court is warranted.

Furthermore, the court of appeals' decision below is directly contrary to, and in conflict with, its unanimous en banc decision in *Sayre & Co.* v. *Riddell, supra.* In *Sayre,* the court of appeals held that the Government of Guam had correctly determined that an Hawaiian corporation was a foreign corporation for Guam income tax purposes. Nonetheless, the court of appeals in this case distinguished *Sayre* on the basis that *Sayre* concerned a corporation and this case involved an individual. The court of appeals chose to follow its decision in *Flores* v. *Government of Guam,* 444 F.2d 284 (9th Cir. 1971), which also concerned an individual *but an indivdual who was a native Guamanian.* As will be discussed hereinafter, the decision in this case and the decision in *Sayre* are irreconcilable. The Director respectfully urges that, in view of the exclusive appellate jurisdiction of the Ninth Circuit over Guam, the existence of this intracircuit conflict is an additional reason which warrants review by this Court. See *John Hancock Ins. Co.* v. *Bartels,* 308 U.S. 180 (1939); and *Dickinson* v. *Petroleum Conversion Corp.,* 338 U.S. 507 (1950).

If, however, this Court chooses not to review the decision below, the Director respectfully requests that this Court remand the case to the Ninth Circuit for a hearing en banc so that the conflict between this case and the *Sayre* case may be resolved. See *United States ex rel. Robinson* v. *Johnston,* 316 U.S. 649 (1942).

In *Sayre & Co.* v. *Riddell, supra,* 411, the Ninth Circuit examined the basic structure of the Internal Revenue Code before concluding that an Hawaiian corporation was a foreign corporation for Guam income tax purposes. The court of appeals stated:

> The tax imposed is based upon jurisdiction over either the person of the taxpayer or the income taxed. Citizens (including domestic corporations) and resident aliens are taxed on all of their net income, regardless of the source. [Section 1 or 11 of the Code.] Non-resident aliens and foreign corporations are taxed only on income from sources within the jurisdiction—upon net income from such sources if the non-resident alien or foreign corporation is engaged in business within the jurisdiction, or upon gross income from sources within the jurisdiction if the non-resident alien or foreign corporation is not engaged in business within the jurisdiction. [Section 871 or 881 of the Code.]

The court then referred to the various administrative rulings cited by the Department of Interior in recommending the 1958 amendments to Section 31 of the Organic Act of Guam. 2 U.S.C. Cong. & Adm. News (1958) 3651. I.T. 2946, *supra,* was cited for the principle that citizens of the United States not residing in the Virgin Islands were to be treated as nonresident aliens of the Virgin Islands. I. T. 4046, *supra* (subsequently updated and restated in Rev. Rul. 70-229, 1970-1 Cum. Bull. 164), was cited for the proposition that the principles of I. T. 2946 are applicable to Guam. In addition, Rev. Rul. 56, *supra* (citizens of Guam residing in Guam are nonresident aliens for purposes of the United States income tax); Rev. Rul. 8, *supra* (citizens of the United States residing in the United States are nonresident aliens for the purpose of the Guam income tax); and Rev. Rul. 55-184, 1955-1 Cum. Bull. 500 (the United States and Guam income tax

laws are to be imposed on the basis outlined above) all were favorably cited by the court.

The court of appeals then concluded (*Sayre & Co.* v. *Riddell, supra,* 412):

> It would seem clear that the same approach must be taken with corporate taxpayers—a corporation organized in Guam is "domestic" for the purposes of the Guam income tax, a corporation organized elsewhere is "foreign." [Footnote omitted.] As we have seen, within the basic structure of the Code, the alternative to treating a corporation organized in one of the United States as "foreign" to Guam is to treat it as a domestic Guam corporation. The tax provided by section 881 of the Code does not apply to corporations domestic to Guam [just as Section 871 of the Code does not apply to citizens or resident aliens of Guam], *which must pay the Guam territorial income tax upon all of their net income, wherever earned.* 26 U.S.C. § 11 (1964). [Section 1 of the Code as to individuals.] To avoid this result would require further modification of the basic substantive provisions of the statute, a course we think denied to us, just as we have held it to be denied to the officials of Guam * * *. [Emphasis supplied.[9]]

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[9] See *Chicago Bridge and Iron Co.* v. *Wheatley,* 430 F. 2d 973 (3rd Cir. 1970), cert. denied, 401 U.S. 910 (1971), wherein the Third Circuit held that a Delaware corporation was a domestic corporation of the Virgin Islands solely for purposes of Section 921 of the Code so that the corporation would be entitled to use the Western Hemisphere trade corporations deduction to reduce its income tax liability to the Virgin Islands. The court clearly recognized the principle that a stateside United States corporation is generally treated as a foreign corporation for Virgin Islands income tax purposes. Furthermore, in reaction to the decision of the Third Circuit in *Chicago Bridge and Iron Co.* v. *Wheatley, supra,* Congress, in the Revenue Act of 1971 (Section 307 of P. L. 92-178), eliminated this exception to the general rule by repealing Section 921 of the Code for purposes of the Virgin Islands mirror Code.

The symmetry that led the Ninth Circuit to classify the Hawaiian corporation as foreign for Guam income tax purposes is equally applicable to individuals. Compare Sections 1 and 11 of the Code with Sections 871 and 881 of the Code. (Appendix B, *infra*, pp. 8a-11a.) The decision of the Ninth Circuit in this case can only be correct if the en banc decision in *Sayre* is overruled. The cases cannot be distinguished on the basis of the individual/corporate dichotomy suggested by the Ninth Circuit.

The court of appeals' decision below was based upon its decision in *Flores* v. *Government of Guam, supra,* and its erroneous reasoning in that case that Guam's ability to classify non-Guamanian United States citizens who are not residents of Guam as nonresident aliens for Guam income tax purposes, depended upon the availability of Section 932 of the Code (Appendix B, *infra*, p. 12a.) to Guam. The symmetry that arises under the mirror theory, and which has been previously noted in (i) *Sayre* v. *Riddell, supra,* (ii) the Director's substitutions and changes in the Income Tax Regulations promulgated under Sections 1 and 871 of the Code that are required under Section 31(e) of the Organic Act, and (iii) I. T. 2946, *supra,* and Rev. Rul. 8, *supra,* was not based upon the availability of Section 932 of the Code to Guam. The availability of Section 932 of the Code to Guam is merely further evidence that the Director's position is correct.

In *Flores* v. *Government of Guam, supra,* the Ninth Circuit was concerned with an attempt by Guam to classify a *native* Guamanian, who had received his United States citizenship by naturalization in California, rather than collectively through the Organic Act, as a nonresident alien of Guam for Guam income tax purposes. Although we respectfully submit that the

Government's position in *Flores* is a correct interpretation of the mirror theory, we can understand the Ninth Circuit's reluctance to classify a *native* Guamanian as an alien (whether resident or nonresident) for Guam income tax purposes. The *Flores* case, however, was not concerned with the broader problem that is presented in this case; that is, the classification of United States citizens who are not residents of Guam, and who are not also citizens of Guam, as nonresident aliens for Guam income tax purposes. Thus, the court of appeals should not have considered *Flores* as controlling its decision in this case.

Moreover, that portion of *Flores* which held that Section 932 of the Code is not available to Guam prior to 1973 is erroneous. The court's decision in this regard is based upon a misunderstanding of the legislative history of the amendments to the Organic Act of Guam in 1958. The Senate Report accompanying the 1958 amendments to Section 31, and relied upon in *Flores* (pp. 287-288), expressly provides that Section 932 of the Code was manifestly inapplicable or incompatible with the Internal Revenue Code as applied to Guam. S. Rep. No. 2176, 85th Cong., 2d Sess., 3, 4 (2 U.S.C. Cong. & Adm. News (1958) 3648, 3649).

As we have previously noted, however, this same Senate Report specifically approved the administrative rulings classifying non-Guamanian United States citizens who do not reside in Guam as nonresident aliens of Guam for Guam income tax purposes. S. Rep. No. 2176, *supra*, 5, 6 (2 U.S.C. Cong. & Adm. News (1958) 3651, 3653). Moreover, when Congress enacted Section 935 in 1972, and specifically amended Section 932 to remove citizens of Guam from its provisions, Congress recognized that, with respect to Subchapter S corporations formed in Guam, " * * * under present

law U. S. stateside citizens may not be such shareholders since they previously have been classified as nonresident aliens under Guamanian tax law * * *." H. Rep. No. 92-1479, *supra,* 9. Finally, and perhaps most importantly, the reason for the express language used in the Senate Report can be explained by looking at the legislative reason for the enactment of the 1958 amendments.

Prior to the 1958 amendments to Section 31 of the Organic Act, taxpayers were raising arguments that Section 931 or 932 of the Code relieved non-Guamanian United States citizens or Guamanians who had received their United States citizenship under the Organic Act of Guam from paying any Guam taxes. See *Laguana* v. *Ansell, supra; Lamkin* v. *Brown and Root,* 233 F.2d 320 (9th Cir. 1956); *Phelan* v. *Taitano,* 233 F.2d 117 (9th Cir. 1956); and *Jennings* v. *United, States, supra.* See S. Rep. No. 2176, *supra,* 1-7 (2 U.S.C. Cong. & Adm. News (1958) 3647-3653).[10] The applicability of Section 932 of the Code to Guam was considered only in this context and its applicability should be limited to this context. Congress did not at any time consider Section 932 of the Code to be inapplicable to Guam for purposes of classifying individuals such as the Mannings as nonresident aliens for Guam income tax purposes. Considering the fact that the same Senate Report, and subsequent action by the Congress, expressly stated that individuals such as the Mannings were treated as nonresident aliens of Guam for Guam income tax purposes, the Ninth Circuit's interpretation of the legislative history would

[10] The Senate Report points out that, at the time of the 1958 amendments, the District Court of Guam and the Ninth Circuit had rejected these taxpayer contentions, but the preliminary decision of the Court of Claims in *Jennings* had indicated that the Court of Claims may not have agreed with the Ninth Circuit.

frustrate rather than effectuate the clear intent of Congress. The courts, in interpreting statutes, should effectuate whenever possible the will of the legislature. *United States* v. *American Trucking Ass'ns,* 310 U.S. 534 (1940).

In summation, we respectfully request this Court to consider particularly the following matters in its consideration of this petition:

(1) The decision below is of substantial economic importance to the Government of Guam. If such decision is left to stand, it will have a significant adverse effect on the collection or retention of revenues that Congress clearly intended Guam to have. Accordingly, the operations of the Guamanian Government will be adversely affected.

(2) The decision below would create chaos if the Director, in an attempt to recoup the lost revenue, were to impose a tax on the worldwide income of individuals such as the Mannings.

(3) The decision of the court of appeals will place an administrative burden of immense, and perhaps unmanageable, proportions on the Office of the Director by requiring the review and audit of more than 4,500 Guam income tax returns.

(4) The Guam internal revenue statute is, and has always been considered as, a "mirror'" image of the United States Internal Revenue Code of 1954. The decision below is contrary to long-standing administrative rulings (which have been promulgated and/or repeatedly approved by Congress as long ago as 1935 and as recently as 1972) and is clearly contrary to what Congress considered the mirror system provided as to the taxation by the possessions of United States citizens who are not residents of possessions.

(5) The decision of the court of appeals effectively eliminates the basic underlying premise of the mirror system that Guam and the United States are separate taxing jurisdictions.

(6) The Ninth Circuit is the sole appellate court of recourse for the Government of Guam and the inconsistency of its decision in *Sayre & Co.* v. *Riddell*, *supra*, and the decision in this case has created great confusion in the interpretation of the Guam internal revenue statute.

CONCLUSION

This petition for a writ of certiorari should be granted. Alternatively, the case should be remanded to the Ninth Circuit for a hearing en banc.

Respectfully submitted,

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APPENDIX

(5) The decision of the court of appeals effectively eliminates the basic underlying premise of the mirror system that Guam and the United States are separate taxing jurisdictions.

(6) The Ninth Circuit is the sole appellate court of recourse for the Government of Guam and the inconsistency of its decision in *Squire* v. *Capoeman*, *supra*, and the decision in this case has created great confusion in the interpretation of the Guam internal revenue statute.

CONCLUSION

This petition for a writ of certiorari should be granted. Alternatively, the case should be remanded to the Ninth Circuit for a hearing en banc.

Respectfully submitted,

APPENDIX

APPENDIX A

DISTRICT COURT OF GUAM, TERRITORY OF GUAM

Civil Case No. 58-70

JOHN L. MANNING, ET AL., *Petitioners*

v.

JOAQUIN G. BLAZ, COMMISSIONER OF REVENUE & TAXATION, *Respondent*

(Filed, District Court of Guam, Agana, Guam, December 3, 1971)

Summary Judgment

This matter having come for hearing before the Court on Petitioners' Motion for Summary Judgment and the Respondent having appeared and admitted in its Memorandum of Points and Authorities filed December 2, 1971, that there is no genuine issue of any material fact and that Petitioners are in fact, United States citizens, and the Court having heard the arguments of counsel on the law and having considered Points and Authorities and arguments submitted, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Petitioners are entitled to Summary Judgment in their favor and that there is, therefore, no deficiency for income taxes for Petitioners for the calendar years 1966, 1967 and 1968.

DATED: December 3, 1971.

/s/ Cristobal C. Duenas,
CRISTOBAL C. DUENAS, Judge
District Court of Guam

DISTRICT COURT OF GUAM, TERRITORY OF GUAM

Civil Case No. 32-71

GENERAL INSURERS, INC., *Petitioner*

v.

JOAQUIN G. BLAZ, COMMISSIONER OF REVENUE & TAXATION, *Respondent*

(Filed, District Court of Guam, Agana, Guam, December 3, 1971)

Summary Judgment

This matter having come for hearing before the Court on Petitioner's Motion for Summary Judgment and the Respondent having appeared and admitted in its Memorandum of Points and Authorities filed December 2, 1971, that there is no genuine issue of any material fact and that the three stockholders of Petitioner are, in fact, United States citizens, and the Court having heard the arguments of counsel on the law and having considered Points and Authorities and arguments submitted, Now, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Petitioner General Insurers, Inc. is entitled to and is hereby granted judgment against the Respondent;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that no deficiencies exist for income taxes alleged to be due from Petitioner to Respondent for the years ending September 30, 1966, 1967 and 1968, and that if Petitioner has otherwise complied with the law, it is entitled to be treated as a small business corporation for the years in question pursuant to the provisions of §§ 1371 through 1377 of the Internal Revenue Code.

DATED: December 3, 1971.

/s/ Cristobal C. Duenas,
CRISTOBAL C. DUENAS, Judge
District Court of Guam

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

April 5, 1973

Nos. 72-1204, 72-1206

JOHN L. MANNING, and CARLYN T. MANNING, Husband and Wife, *Petitioners-Appellees*

v.

JOAQUIN G. BLAZ, DIRECTOR OF REVENUE AND TAXATION GOVERNMENT OF GUAM, *Defendant-Appellant*

GENERAL INSURERS, INC., *Petitioner-Appellee*

v.

JOAQUIN G. BLAZ, COMMISSIONER OF REVENUE AND TAXATION, *Respondent-Appellant*

Rehearing and Rehearing En Banc Denied July 5, 1973

Before CHAMBERS, ELY and WALLACE, Circuit Judges.

PER CURIAM:

These appeals involve the applicability of certain sections of the Internal Revenue Code to transactions which have their taxable locus in Guam. By virtue of the Organic Act of Guam,[1] Congress gave Guam a tax structure of its own, patterned closely after the tax system of the United States, but with collections made by and revenues going to the government of Guam. After amendments in 1958,[2] the final effect is that the Internal Revenue Code is in virtual full force and effect in Guam.

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[1] Act of Aug. 1, 1950, ch. 512, § 31, 64 Stat. 392 (48 U.S.C. § 1421i).

[2] Act of Aug. 20, 1958, Pub.L.No. 85-688, § 1, 72 Stat. 681.

The Mannings are citizens of the United States and non-residents of Guam. General Insurers has among its shareholders at least three non-residents of Guam. The government of Guam denied the Mannings the right to file a joint return,[3] and the right to a standard deduction.[4] It denied General Insurers the right to a subchapter S election.[5] The taxpayers filed these cases in the district court, seeking a redetermination of their deficiencies. That court granted a summary judgment in their favor, and the government appealed. We affirm.

Non-resident aliens in the United States and Guam do not enjoy the tax advantages these taxpayers sought. Thus, the sole issue in this appeal is whether a non-Guamanian United States citizen, not a resident of Guam, is to be treated as a non-resident alien for Guamanian tax purposes.

We previously considered the right of non-resident aliens of Guam to file a Guamanian joint return in *Flores* v. *Government of Guam*, 444 F.2d 284 (9th Cir. 1971). There we noted that the government's ability to classify Flores as a non-resident alien depended upon the availability of I.R.C. § 932. However, we held that § 932 was inapplicable to Guam, and therefore Flores could not be denied the right to a joint return by virtue of that section. 444 F.2d at 288-89.

[1, 2] The rule of *Flores* controls the Mannings' right to file a joint return. Furthermore, we perceive no basis for distinction of the claims for a standard deduction and a

---

[3] Int. Rev. Code of 1954, § 6013(a)(1).

[4] Int. Rev. Code of 1954, § 142(b)(1).

[5] Int. Rev. Code of 1954, § 1371(a)(3).

Subchapter S election since the denial of these claims was also founded upon a finding of non-resident alien staus.[6]

Judgment

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-1204

JOHN L. MANNING and CARLYN T. MANNING, husband and wife, *Petitioners-Appellees*

vs.

JOAQUIN G. BLAZ, DIRECTOR OF REVENUE AND TAXATION GOVERNMENT OF GUAM, *Defendant-Appellant*

APPEAL from the United States District Court for the District of Guam.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Guam and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 5, 1973.

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[6] The recent passage of Pub.L.No. 92-606, 86 Stat. 1494 (Oct. 31, 1972), adopted a special tax system for Guam and amended Code Section 932. Those changes will eliminate the problems presented by these cases.

Appellant principally relies upon *Sayre & Co.* v. *Riddell*, 395 F. 2d 407 (9th Cir. 1968) (en banc). That case upheld the classification of a Hawaii company as a foreign corporation for Guamanian tax purposes. *Flores*, however, concerned individuals and is controlling here.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-1206

GENERAL INSURERS, INC., *Petitioner-Appellee*

vs.

JOAQUIN G. BLAZ, Commissioner of Revenue and Taxation, *Respondent-Appellant*

APPEAL from the United States District Court for the District of Guam.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Guam and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 5, 1973.

APPENDIX B

Organic Act of Guam, c. 512, 64 Stat. 384:

> Sec. 31 [as amended by Sec. 1, Act of August 20, 1958, P.L. 85-688, 72 Stat. 681].
>
> (a) The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.
>
> (b) The income-tax laws in force in Guam pursuant to subsection (a) of this section shall be deemed to impose a separate Territorial income tax, payable to the government of Guam, which tax is designated the "Guam Territorial income tax".
>
> (c) The administration and enforcement of the Guam Territorial income tax shall be performed by or under the supervision of the Governor. Any function

needful to the administration and enforcement of the income-tax laws in force in Guam pursuant to subsection (a) of this section shall be performed by any officer or employee of the government of Guam duly authorized by the Governor (either directly, or indirectly by one or more redelegations of authority) to perform such function.

(d)(1) The income-tax laws in force in Guam pursuant to subsection (a) of this section include but are not limited to the following provisions of the Internal Revenue Code of 1954, where not manifestly inapplicable or incompatible with the intent of this section; Subtitle A (not including chapter 2 and section 931); chapters 24 and 25 of subtitle C, with reference to the collection of income tax at source on wages; and all provisions of subtitle F which apply to the income tax, including provisions as to crimes, other offenses, and forfeitures contained in chapter 75. For the period after 1950 and prior to the effective date of the repeal of any provision of the Internal Revenue Code of 1939 which corresponds to one or more of those provisions of the Internal Revenue Code of 1954 which are included in the income-tax laws in force in Guam pursuant to subsection (a) of this section, such income-tax laws include but are not limited to such provisions of the Internal Revenue Code of 1939.

(2) The Governor or his delegate shall have the same administrative and enforcement powers and remedies with regard to the Guam Territorial income tax as the Secretary of the Treasury, and other United States officials of the executive branch, have with respect to the United States income tax. Needful rules and regulations for enforcement of the Guam Territorial income tax shall be prescribed by the Governor. The Governor or his delegate shall have authority to issue, from time to time, in whole or in part, the text of the income-tax laws in force in Guam pursuant to subsection (a) of this section.

(e) In applying as the Guam Territorial income tax the income-tax laws in force in Guam pursuant to subsection (a) of this section, except where it is manifestly otherwise required, the applicable provisions of the Internal Revenue Codes of 1954 and 1939, shall

be read so as to substitute "Guam" for "United States", "Governor or his delegate" for "Secretary or his delegate", "Governor or his delegate" for "Commissioner of Internal Revenue" and "Collector of Internal Revenue", "District Court of Guam" for "district court" and with other changes in nomenclature and other language, including the omission of inapplicable language, where necessary to effect the intent of this section.

* * * *

[48 U.S.C. 1421i].

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 1 [as amended by Sec. 803(a) of the Tax Reform Act of 1969, P.L. 91-172].[11] TAX IMPOSED

(a) *Married Individuals Filing Joint Returns and Surviving Spouses.*—There is hereby imposed on the taxable income of—

(1) every married individual *** who makes a single return jointly with his spouse under section 6013, and

(2) every surviving spouse *** a tax determined in accordance with the following table: ***

(b) *Heads of Households.*—There is hereby imposed on the taxable income of every individual who is the head of a household *** a tax determined in accordance with the following table: ***

(c) *Unmarried Individuals (Other Than Surviving Spouses and Heads of Households).*—There is hereby imposed on the taxable income of every individual (other than a surviving spouse *** or the head of a house-

[11] The amendment to Section 1 of the Code by the Tax Reform Act of 1969, *supra*, effective with respect to taxable years beginning after December 31, 1970, altered in some respects the language of this section, but the changes are not substantive for purposes of the instant case.

hold ***) who is not a married individual *** a tax determined in accordance with the following: ***

(d) *Married Individuals Filing Separate Returns; Estates and Trusts.*—There is hereby imposed on a taxable income of every married individual *** who does not make a single return jointly with his spouse under section 6013, and of every estate and trust taxable under this subsection, a tax determined in accordance with the following table: ***

SEC. 11 [as amended by Sec. 104(b)(2)(B) of the Foreign Investors Tax Act of 1966, P.L. 89-809, 80 Stat. 1539].[12]

TAX IMPOSED.

(a) *Corporations In General.*—A tax is hereby imposed for each taxable year on the taxable income of every corporation. ***

(f) *Foreign Corporations.*—In the case of a foreign corporation, the tax imposed by subsection (a) shall apply only as provided by section 882.

SEC. 142. INDIVIDUALS NOT ELIGIBLE FOR STANDARD DEDUCTION.

(b) *Certain Other Taxpayers Ineligible.*—The standard deduction shall not be allowed in computing the taxable income of—

(1) a nonresident alien individual;

(2) a citizen of the United States entitled to the benefits of section 931 (relating to income from sources within possessions of the United States);

---

[12] The amendments to Sections 11, 871, 872, 873, 881 and 932 of the Code made by Sections 103 and 104 of the Foreign Investors Tax Act are applicable to years beginning after December 31, 1966; no substantive changes were made in the sections involved.

(3) an individual making a return under section 443(a)(1) for a period of less than 12 months on account of a change in his annual accounting period; or

(4) an estate or trust, common trust fund, or partnership.

SEC. 871 [as amended by Sec. 103(a), Foreign Investors Tax Act of 1966, *supra*]. TAX ON NONRESIDENT ALIEN INDIVIDUALS.

(a) *Income Not Connected With United States Business—30 Percent Tax.*—

(1) *Income other than capital gains.*—There is hereby imposed for each taxable year a tax of 30 percent of the amount received from sources within the United States by a nonresident alien individual as—

(A) interest (other than original issue discount as defined in section 1232(b)), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income,

* * * *

but only to the extent the amount so received is not effectively connected with the conduct of a trade or business within the United States.

SEC. 872. GROSS INCOME.

(a) [as amended by Sec. 103(b), Foreign Investors Tax Act of 1966, *supra*]. *General Rule.*—In the case of a nonresident alien individual, gross income includes only—

(1) gross income which is derived from sources within the United States and which is not effectively

connected with the conduct of a trade or business within the United States, and

(2) gross income which is effectively connected with the conduct of a trade or business within the United States.

* * * *

SEC. 873. DEDUCTIONS.

* * * *

(c) [as amended by Sec. 103(c), Foreign Investors Tax Act of 1966, *supra*]. *Cross References.*—

(1) *for disallowance of standard deduction, see section 142(b)(1).*

SEC. 881. TAX ON INCOME OF FOREIGN CORPORATIONS NOT CONNECTED WITH UNITED STATES BUSINESS.

(a) [as amended by Section 313(f) of the Tax Reform Act of 1969 and Section 104(a) of the Foreign Investors Tax Act of 1966, *supra*]. Imposition of Tax.—There is hereby imposed for each taxable year a tax of 30 percent of the amount received from sources within the United States by a foreign corporation as—

(1) interest (other than original issue discount as defined in section 1232(b)), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income,

* * * *

but only to the extent the amount so received is not effectively connected with the conduct of a trade or business within the United States.

* * * *

SEC. 921.[13] DEFINITION OF WESTERN HEMISPHERE TRADE CORPORATIONS.

For the purposes of this subtitle, the term "Western Hemisphere trade corporation" means a domestic corporation all of whose business (other than incidental purchases) is done in any country or countries in North, Central, or South America, or in the West Indies, and which satisfies the following conditions:

• • • •

SEC. 932. CITIZENS OF POSSESSIONS OF THE UNITED STATES.

(a) [as amended by Sec. 103(m), Foreign Investors Tax Act of 1966, *supra*] General rule.—Any individual who is a citizen of any possession of the United States (but not otherwise a citizen of the United States) and who is not a resident of the United States shall be subject to taxation under this subtitle in the same manner and subject to the same conditions as in the case of a nonresident alien individual. This section shall have no application in the case of a citizen of Puerto Rico.[14]

SEC. 935. [as added by Section 1(a) of Act of October 31, 1972, *supra*]. COORDINATION OF UNITED STATES AND GUAM INDIVIDUAL INCOME TAXES.

(a) *Application of Section.*—This section shall apply to any individual for the taxable year who—

(1) is a resident of Guam,

(2) is a citizen of Guam but not otherwise a citizen of the United States,

---

[13] Section 921 of the Code shall be treated as being repealed by Sec. 307 of the Revenue Act of 1971, P.L. 92-178 for purposes of applying the Internal Revenue Code to the Virgin Islands.

[14] The last sentence of Section 932(a) of the Code now reads that "[t]his section shall have no application in the case of a citizen of Puerto Rico or Guam." Section 1(b)(2) of Act of October 31, 1972, P.L. 92-606, 86 Stat. 1494.

(3) has income derived from Guam for the taxable year and is a citizen or resident of the United States, or

(4) files a joint return for the taxable year with an individual who satisfies paragraph (1), (2) or (3) for the taxable year.

(b) Filing Requirement.—

(1) *In General.*—Each individual to whom this section applies for the taxable year shall file his income tax return for the taxable year—

(A) with the United States, if he is a resident of the United States,

(B) with Guam, if he is a resident of Guam, and

(C) if neither subparagraph (A) nor subparagraph (B) applies—

(i) with Guam, if he is a citizen of Guam but not otherwise a citizen of the United States, or

(ii) with the United States, if clause (i) does not apply.

* * * *

(c) Extent of Income Tax Liability.—In the case of any individual to whom this section applies for the taxable year—

(1) for purposes of so much of this title (other than this section and section 7654) as relates to the taxes imposed by this chapter, the United States shall be treated as including Guam,

(2) for purposes of the Guam territorial income tax, Guam shall be treated as including the United States, and

(3) such individual is hereby relieved of liability for income tax for such year to the jurisdiction (the United States or Guam) other than the jurisdiction with which he is required to file under subsection (b).

SEC. 1371. DEFINITIONS.

(a) *Small Business Corporation.*—For purposes of the subchapter, the term "small business corporation" means a domestic corporation which is not a member of an affiliated group (as defined in section 1504) and which does not—

• • • •

(3) have a nonresident alien as a shareholder; and

• • • •

SEC. 6013. JOINT RETURNS OF INCOME TAX BY HUSBAND AND WIFE.

(a) *Joint Returns.*—A husband and wife may make a single return jointly of income taxes under subtitle A, even though one of the spouses has neither gross income nor deductions, except as provided below:

(1) no joint return shall be made if either the husband or wife at any time during the taxable year is a nonresident alien;

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§ 1.871-1 *Taxation of aliens.*

For purposes of the income tax, alien individuals are divided generally into two classes, namely, resident aliens and nonresident aliens. Resident aliens are, in general, taxable the same as citizens of the United States; that is, a resident alien is taxable on income derived from all sources, including sources without the United States. Nonresident aliens are taxable only on income from sources within the United States. For classification of nonresident aliens, see §1.871-7. For

determination of the sources of income, see §§ 1.861-1 to 1.863-6, inclusive.

§1.871-2 *Determining residence of alien individuals.*

(a) *General.* The term "nonresident alien individual" means an individual whose residence is not within the United States, and who is not a citizen of the United States. The term includes a nonresident alien fiduciary. For such purpose the term "fiduciary" shall have the meaning assigned to it by section 7701(a)(6) and the regulations in Part 301 of this chapter (Regulations on Procedure and Administration). For presumption as to an alien's nonresidence, see paragraph (b) of § 1.871-4.

(b) *Residence defined.* An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but, if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

SUPREME COURT, U. S.

Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1973

No. 73-750

JOAQUIN G. BLAZ, Director of Revenue and Taxation, Government of Guam,
Petitioner,

vs.

JOHN L. MANNING and CARLYN T. MANNING, Husband and Wife, and GENERAL INSURERS, INC.,
Respondents.

Respondent's Brief in Opposition to Petition for Writ of Certiorari

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QUESTION PRESENTED

The question presented is whether United States citizens having income derived from Guam only between the years 1968 and 1972, inclusive, are to be taxed as non-resident aliens. As applied, the non-resident alien tax is a penalty tax imposing a greater burden on the taxpayer than the tax burden of a United States citizen under the Internal Revenue Code. Non-resident aliens are denied the standard deductions and many other deductions and are allowed

only one exemption. Canadian and Mexican citizens are not so taxed and the net effect of the tax was to allow Guam to tax the United States citizen at a higher rate than the United States taxed a Canadian or Mexican citizen.

Respondents take issue with the statement in petitioner's paragraph entitled "Question Presented" to the effect that all United States citizens would be fully taxable for the years prior to 1973 on worldwide income by Guam. This simply is not so. Even native born Guamanians not resident in Guam have never been taxed by Guam on their worldwide income unless they reside in Guam. At most, the proposition is simply a statement of intention by respondent to try to tax United States citizens in that manner if he is not successful in this litigation. In any event such an attempt would be limited to the years 1968-1972, inclusive.

STATEMENT

From the passage of the Guam Organic Act in 1950 until the decision of *Sayre* vs. *Riddell*, 395 F2d 407 (9th Cir., 1968), Guam did not tax United States citizens not residing in Guam as non-resident aliens. However, the *Sayre* decision referred to certain Internal Revenue rulings cited therein for the proposition that the Internal Revenue Service considered United States citizens not residing in Guam as non-resident aliens to Guam for tax purposes. Thereafter

a penalty tax was imposed by petitioner on all United States citizens, not native-born, who had not resided on Guam for the entire taxable year. The authority of *Sayre* to tax United States citizens as aliens was dicta only since *Sayre* decided only the taxability of non-domestic corporations as foreign corporations.

In *Flores* vs. *Government of Guam*, 444 F2d 284 (9th Cir., 1971), it was pointed out to the Court of Appeals that the revenue rulings relating to individuals were wrong as applied to Guam since §932 of the Internal Revenue Code was manifestly inapplicable or incompatible with the Internal Revenue Code as applied to Guam.

Petitioner in this action did not contest the decision of the Court of Appeals for the Ninth Circuit in the *Flores* case nor was a petition for certiorari filed in that action. Nevertheless, petitioner refused to recognize or follow the *Flores* decision and it became necessary to litigate further cases involving the non-resident alien question among which are the instant cases.

ARGUMENTS AGAINST GRANTING THE WRIT

I.

PETITIONER'S ARGUMENT IS BASED PRIMARILY UPON CONSIDERATIONS OF ECONOMIC AND ADMINISTRATIVE DIFFICULTIES

Economics and administrative difficulties are improper arguments. To illustrate, one simply need ask

how far an individual taxpayer would get on an appeal by pleading that he couldn't afford to pay the tax. These issues were not raised at the trial level and were not argued seriously at the appellate level until the petition for a rehearing. Petitioner's petition is full of evidentiary matter not introduced at the trial and not in the record pertaining to economic and administrative hardship. Such evidentiary matter should be disregarded in fairness to respondents.

II.

INTERNAL REVENUE CODE §932 IS INAPPLICABLE TO GUAM

Petitioner argues that §932 of the Internal Revenue Code should be applicable to Guam but even if it isn't, the petitioner can tax United States citizens as non-resident aliens. No authority under the Internal Revenue Code is cited for that proposition.

The argument of petitioner would attempt to classify collectively naturalized Guamanians as non-resident aliens to the United States and United States citizens as non-resident aliens to Guam for tax purposes without the use of §932(a). This is not possible since without §932, no one residing in territory under the jurisdiction of the United States can be classified as an alien. It has been true for many years that the inhabitants of territory acquired by conquest and treaty *are not aliens. Gonzales* vs. *Williams*, 192 U.S. 1, 48 L.Ed. 317, 24 S.Ct. 177. Thus, without §932, no Guamanian, whether collectively or individually

naturalized, nor anyone else who is a United States citizen can be clasified as alien for tax purposes or otherwise. Section 932 and its predecessor statutes were enacted for the express purpose of classifying United States nationals of territories and possessions (not aliens, but also not "otherwise U.S. citizens") as aliens for tax purposes only. No such classification even of nationals is possible without §932.

III.

THE NEW LEGISLATION IS IN ACCORD WITH PETITIONER'S PRE-1968 CONDUCT AND WITH THE COURT OF APPEALS DECISION

From 1950 to 1968 the petitioner did not attempt to tax United States citizens as non-resident aliens to Guam. Beginning with the *Sayre* case in 1968 and using as authority the dicta relating to Internal Revenue rulings as they applied to individuals, the petitioner began taxing non-resident United States citizens as non-resident aliens.

In October, 1972, Congress passed legislation whereby United States citizens with Guam income file only one return depending on their residence at the end of the year. (I.R.C. §935) Thus the only tax years affected by the Court of Appeals decision in the instant case are 1968 through 1972. A reversal would result in a penalty tax applying to United States citizens for 1968 through 1972 but not for the years 1950 through 1967 and 1973 and subsequently. A uniform treatment of all taxpayers there-

fore can only be achieved by a denial of this petition for certiorari or a subsequent affirmance of the Court of Appeals for the Ninth Circuit.

IV.

GUAM LOSES NO REVENUE TO WHICH IT IS ENTITLED

The Government of Guam loses no revenue by this decision except whatever it may have collected in addition to the ordinary tax imposed by the application of a penalty tax against United States citizens with Guam income who were not resident in Guam for an entire taxable year. Actually, it is too late for some of those penalized by the alien tax to file for refunds and many others will not file claims. Guam will therefore profit by keeping such funds.

V.

CONCLUSION

The decisions of the Court of Appeals in *Flores* and the instant case were fair and correct and the petition for writ of certiorari should therefore be denied.

Respectfully submitted,

Dated: December 4, 1973.

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PROOF OF SERVICE

I, W. Scott Barrett, one of the attorneys for Repondents, hereby certify that on this day I served copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United State Court of Appeals for the Ninth Circuit, as follows:

Three copies upon Martin Kalb, Arent, Fox, Kintner, Plotkin & Kahn, Federal Bar Building, 1815 H Street, N.W., Washington, D. C. 20006; Keith L. Andrews, Attorney General, Government of Guam, Post Office Box DA, Agana, Guam 96910.

All said copies were deposited in the United States mail at Oakland, California, with first class air mail postage prepaid, addressed as above, this 7th day of December, 1973.

Dated this 7th day of December, 1973.

W. SCOTT BARRETT

Supreme Court, U. S.
FILED
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No. 73-750

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Supreme Court of the United States

OCTOBER TERM, 1973

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v.

JOHN L. MANNING AND CARLYN T. MANNING, HUSBAND AND WIFE, AND GENERAL INSURERS, INC., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY MEMORANDUM FOR THE PETITIONER

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY MEMORANDUM FOR THE PETITIONER

In its brief in opposition, respondents argue that the petitioner's statement of the "Question Presented" is erroneous. It is the position of the petitioner, as stated in the petition for a writ of certiorari, p. 2, that, if the decision below were left to stand intact, it would necessarily follow that *all United States citizens, whether or not they have Guam-based income, would be fully taxable for years prior to 1973 in both the United States and Guam on their entire worldwide income. Sayre & Co.* v. *Riddell,* 395 F.2d 407, 412 (9th

Cir. 1968). Respondents state that "the [preceding] proposition is simply a statement of intention by respondent [sic] to try to tax United States citizens in that manner if he is not successful in this litigation." Respondent's brief in opposition, p. 2.

The petitioner respectfully submits to this Court that, based on the court of appeals decision below (which concluded that non-Guamanian United States citizens are not to be treated as nonresident aliens of Guam for purposes of Sections 142(b)(1), 1371(a)(3) and 6013(a)(1) of the Internal Revenue Code of 1954 (the "Code")), non-Guamanian United States citizens who do not reside in Guam are to be taxed on their worldwide income in both Guam and the United States for years prior to 1973, because only nonresident aliens can have their reportable gross income limited to the income from the jurisdiction involved. Section 871 of the Code; Section 1.871-1 of the Treasury Regulations on Income Tax (1954 Code). See also petition for certiorari, pp. 14, 15. The Ninth Circuit itself recognized this principle in *Sayre* when it stated that Section 881 of the Code does not apply "to corporations domestic to Guam, which must pay the Guam territorial income tax upon all of their net income, wherever earned." *Sayre & Co.* v. *Riddell, supra,* 412. The same principle applies to individuals under Sections 1 and 871 of the Code.

In support of their position, however, respondents maintain that even native born Guamanians who do not reside in Guam have never been taxed on their worldwide income by Guam. This statement is incorrect. The reason why most native born Guamanians who reside in the United States were not required by the Guam tax officials to file a return in Guam is that

prior to 1973 Guam permitted such individuals the benefits of Section 911 of the Code (and its $20,000 or $25,000 exclusion). Where, however, such an individual had Guam source income or had earned income in the United States greater than the maximum amount excludable from his gross income under Section 911, the Guam tax officials have always maintained that such an individual must file a Guam tax return. Such an individual would then be permitted the benefits of Sections 901 and 911 on his Guam tax return and Section 901 on his United States tax return so as to reduce, if not completely eliminate, any double taxation that may arise by having to file two different returns that include his worldwide income. Moreover, Guamanians who do not reside in either Guam or the United States have always filed their returns that include their worldwide income with Guam and not the United States.

The instances where a Guamanian had to file two tax returns which included his worldwide income under the preceding circumstances have been few. The petitioner has always recognized the inequities involved in such a method of taxation; this was one of the reasons the petitioner fully supported the legislation which became the Act of October 31, 1972, P.L. 92-606, 86 Stat. 1494.

The petitioner does not presently desire to tax non-Guamanian United States citizens who do not reside in Guam on their worldwide income for years prior to 1973. However, the petitioner believes that he would be justified in so doing under the opinion below and, therefore, *respectfully urges this Court to grant the petition for a writ of certiorari so that this question can be resolved at the present time.*

In their brief in opposition, respondents argue that (1) economics and administrative difficulty are improper arguments; (2) Guam loses no revenue to which it is entitled under the decision below; (3) Section 932 of the Code is inapplicable to Guam; and (4) the Act of October 31, 1972, *supra,* is in accord with petitioner's pre-1968 conduct and with the court of appeals decision.

1. Economics and Administrative Difficulty Are Proper Arguments.

One of the considerations governing review on certiorari in tax cases is whether the appellate court's decision "would afford a precedent for the tax treatment of substantial sums" of money. *United States* v. *Chicago, Burlington & Quincy Railroad Co.,* 412 U.S. 401, 404 (1973). See also *Commissioner* v. *Lincoln Savings & Loan Association,* 403 U.S. 345 (1971). Where, as in the situation presented in these consolidated cases, the appellate court's decision will result in potential claims for refund in the amount of at least $1,961,723, plus statutory interest, this evidentiary matter is important and is one of the principal reasons for requesting that this Court grant certiorari.

In determining the potential revenue loss to the Government of Guam under the decision below (which amounts to 5 percent of the income tax assessments in Guam for 1972), the Deputy Commissioner of Revenue & Taxation limited his survey to those returns filed in Guam in 1970, 1971 and 1972 by non-Guamanian United States citizens because the statute of limitations for filing claims for refund for these years has not expired. Section 6511(a) of the Code. For the calendar year 1970, the statute of limitations will expire on April 15, 1974. Although the dollar amount of potential

revenue loss may not seem substantial when compared to the tax revenues collected in the United States, for a territory such as Guam, a 5 percent revenue loss will create severe economic consequences in the operation of the Government.

The decision of the court of appeals will require the Office of the Director to review every claim for refund filed in Guam by non-Guamanian United States citizens. In addition, to the extent that any tax paid to Guam is refunded to such an individual, the individual must report and return to the United States taxing authorities the corresponding decrease in the foreign tax credit previously claimed on his United States income tax return. See Section 905(c) of the Code. Thus, the decision below may affect, and result in, the review and audit of over 9,000 tax returns filed in Guam and the United States. Accordingly, the decision below also places an administrative burden on the Commissioner of Internal Revenue.

2. Guam Loses Revenue To Which It Is Entitled.

The respondent urges that Guam loses no revenue to which it is entitled under the court of appeals decision. Since the enactment of the Organic Act of Guam, Guam tax officials, United States tax officials and Congress have stated and believed that non-Guamanian United States citizens who did not reside in Guam were treated as nonresident aliens in Guam for Guam income tax purposes prior to 1973. See Rev. Rul. 8, 1953-1 Cum. Bull. 300; H. Rep. No. 92-1479, 92nd Cong., 2. Sess., 9 (1972) (3 U.S.C. Cong. & Adm. News (1972) 5408). The relevant revenues and expenditures that are taken into account in planning the operation of the Government of Guam were determined under this principle of law until 1973.

Under the court of appeals decision, instead of this revenue being entirely payable to the Government of Guam, as expected, the ultimate beneficiary of most of this revenue will turn out to be the United States. This follows by reason of the operation of the foreign tax credit under Sections 901, 904 and 905(c) of the Code. In other words, where (as a result of the decision of the court of appeals) a non-Guamanian United States citizen receives a refund of Guam income tax and is taxed in the United States at an average tax rate that is less than the 30 percent rate attributable to nonresident aliens under Section 871(a), he is required to report and return a portion of his refund to the United States because of a proportionate decrease in the available foreign tax credit originally claimed on his United States return. If, however, such an individual is taxed in the United States at an average tax rate that is 30 percent or greater, then he gets a full credit on his United States tax return for taxes paid to Guam. Thus, any refund to such an individual of taxes paid to Guam will cause an equal or proportionate increase in taxes payable to the United States. In essence then, if the decision below is allowed to stand, to the extent that non-Guamanian United States citizens reduce their taxes paid to Guam for the taxable years 1970, 1971 and 1972 and thereby increase their taxes paid to the United States, *Guam will be subsidizing the United States with revenues that Congress intended the Government of Guam to have.* See H. Rep. No. 92-1479, *supra,* wherein Congress specifically stated that prior to 1973 non-Guamanian United States citizens who did not reside in Guam were treated as nonresident aliens of Guam for Guam income tax purposes.

3. Section 932 Was Applicable to Guam Prior to 1973.

(a) It is petitioner's position that, with respect to taxable years beginning before January 1, 1973, Section 932(a) of the Code specifically treated Guamanians, who were collectively United States citizens by reason of the Guam Organic Act, the same as nonresident aliens of the United States for Federal income tax purposes. It is clear that this is a correct interpretation of the law. See Rev. Rul. 56, 1953-1 Cum. Bull. 303; Rev. Rul. 70-230, 1970-1 Cum. Bull. 166. Nothing in *Flores* v. *Government of Guam,* 444 F.2d 284 (9th Cir. 1971), or the decision below, leads to a different conclusion. See O.D. 333, 1 Cum. Bull. 267 (1919), which applied the principle of Section 260 of the Revenue Act of 1918 (predecessor to Section 932) to the Virgin Islands by stating:

> Citizens of the Virgin Islands who are not otherwise citizens of the United States and who are not residents of the United States are taxed only on income from sources within the United States [*i.e.,* as nonresident aliens]. Citizens of the Virgin Islands who are residents of the United States are taxed on the same basis as other citizens of the United States.

The petitioner knows of no authority, and the respondents cite no authority in their brief, to support the proposition that Section 932 and its predecessor provisions were enacted for the express purpose of classifying United States nationals of territories and possessions as aliens for income tax purposes only. This is simply incorrect. This is demonstrated by the continued application of Section 932 to citizens of the Virgin Islands who are collectively citizens of the United States under Section 306 of the Immigration

and Nationality Act (8 U.S.C. 1970 ed. § 1406), but are not otherwise citizens of the United States and who are not residents of the United States. Such individuals are still treated as nonresident aliens of the United States for Federal income tax purposes. See Section 1.932-1(a) of the Treasury Regulations on Income Tax (1954 Code).

Accordingly, in order for non-Guamanian United States citizens who did not reside in Guam to have had the equality of treatment under the mirror system of taxation, it must follow that they are to be treated as nonresident aliens of Guam for Guam income tax purposes prior to 1973. See *Sayre & Co.* v. *Riddell,* 395 F.2d 407, 412 (9th Cir. 1968); *Chicago Bridge and Iron Co.* v. *Wheatley,* 430 F.2d 973, 976 (3rd Cir. 1970), cert. denied, 401 U.S. 910 (1971).

(b) Even if Section 932 could not have been "mirrored" prior to 1973 to classify non-Guamanian United States citizens who did not reside in Guam as nonresident aliens of Guam for Guam income tax purposes, the position of the petitioner is still correct. See petition for certiorari, pp. 6-10. That is, since neither the Mannings nor the other non-Guamanian United States citizen shareholders of General Insurers were born or naturalized in Guam, they are clearly aliens of Guam for purposes of the Guam income tax. Section 1.1-1(c) of the Treasury Regulations on Income Tax (1954 Code), as modified pursuant to Section 31(e) of the Organic Act. In addition, since these individuals are not residents of Guam, it must follow that they are treated as nonresident aliens. See Section 1.871-2(a) of the Treasury Regulations on Income Tax (1954 Code), as modified pursuant to Section 31(e) of the Organic Act. Thus, while we

agree with respondents' assertion that Section 932(a) was necessary to treat Guamanian United States citizens who do not reside in the United States as nonresident aliens of the United States for purposes of the United States income tax, the respondents are in error when they assert that Section 932(a) had to be applicable to Guam to treat non-Guamanian United States citizens who did not reside in Guam as nonresident aliens of Guam for purposes of the Guam income tax prior to 1973. *Cf. Sayre & Co.* v. *Riddell, supra.*

4. The Legislative History of the Act of October 31, 1972 Is in Accord With Petitioner's Position in These Consolidated Cases.

In 1972, Congress completely changed the taxation of Guamanian United States citizens, non-Guamanian United States citizens residing in Guam, and non-Guamanian United States citizens with Guam source income, effective for taxable years beginning after December 31, 1972. Act of October 31, 1972, *supra.* Section 935 of the Code provides, in relevant part, that citizens of Guam and non-Guamanian United States citizens are to be taxed in Guam or the United States depending upon their residency at the end of the taxable year. Thus, the adoption of Section 935 of the Code eliminated the dual filing requirement that had been in effect under the Revised Organic Act of Guam prior to 1973. Along with the adoption of the new special tax system for Guam, Section 932 was amended to specifically exclude Guamanians from being classified as nonresident aliens for United States tax purposes. Thus, Guamanians are now (in contradistinction to years prior to 1973) treated in the same manner for tax purposes as are all other United States

citizens. H. Rep. No. 92-1479, *supra*. Accordingly, Guamanians or non-Guamanian United States citizens are now subject to taxation on their worldwide income either by the Government of Guam or the United States depending solely upon their residency at the end of the taxable year. (If the taxpayer is not a resident of Guam or the United States, his return is filed with the jurisdiction from which he derived his United States citizenship. Section 935(b)(1)(C) of the Code).

In considering the legislation that became the Act of October 31, 1972, the House Ways and Means Committee specifically considered the issue in these consolidated cases and stated (H. Rep. No. 92-1479, *supra*):

> * * * [A]ny U.S. citizen or resident may be a shareholder in a so-called subchapter S corporation which is created or organized under the law of Guam *(under present law U.S. Stateside citizens may not be such shareholders since they previously have been classified as non-resident aliens under Guamanian tax law)*. [Emphasis added.]

The Committee statement succinctly states the law as it had consistently been applied to non-Guamanian United States citizens from the inception of the Organic Act of Guam until the decision below.[1] Contrary to the statement by the respondents on page 5 of their brief, the Committee statement emphasizes that non-

[1] As previously noted in the petition for certiorari, pp. 20, 21, *Flores* v. *Government of Guam*, *supra*, is distinguishable on its facts, since it involved a native born Guamanian who was a naturalized United States citizen. These cases do not involve such a Guamanian, but rather involve United States citizens who did not receive their citizenship through any contact with Guam.

Guamanian United States citizens who did not reside in Guam were treated as nonresident aliens of Guam for Guam income tax purposes prior to 1973.

The respondents in these consolidated cases concede that non-Guamanian United States citizens who did not reside in Guam returned and reported to Guam income, and only that income, from Guam sources prior to 1973. This method of reporting income is only available to nonresident aliens under the Internal Revenue Code. Section 871 of the Code. See also Section 1.871-1 of the Treasury Regulations on Income Tax (1954 Code).

For the reasons stated in this reply memorandum, as well as the reasons stated in the petition for a writ of certiorari, we respectfully request this Court to grant the petition. Alternatively, these consolidated cases should be remanded to the Ninth Circuit for a hearing en banc.

Respectfully submitted,

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